A

Ali Soleiman Hassan Zadeh v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–64–02 OF 2012 (IRN)
ROHANA YUSUF, TENGKU MAIMUN AND ZAKARIA SAM JJCA
26 JANUARY 2015

C

Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking — Trafficking in 367.4g of methamphetamine — Appeal against conviction and sentence — Drugs in shape of capsules found in appellant's tummy — Whether trial judge erred in failing to recognise appellant's defence that he swallowed only 80 capsules — Misdirection on presumption of knowledge and presumption of trafficking — Whether ipso facto warrant an acquittal — Whether appellant in actual possession of drugs at the time of his arrest and when detained — Whether evidence against appellant overwhelming — Whether conviction of appellant safe — Whether appellate interference warranted — Dangerous Drugs Act 1952 ss 2, 37(d), 37(da) & 39B(1)

D

E

The appellant appealed to this court against the conviction and sentence of death for trafficking dangerous drugs under s 39B of the Dangerous Drugs Act 1952 ('the DDA'). The appellant was stopped by a team of Narcotics Officers led by SP3 at the International Arrival Hall, KLIA Sepang. An examination of the appellant and his baggage did not reveal anything wrong. The appellant was then taken to the Serdang Hospital and the image of the x-ray performed on him revealed that there were foreign bodies in the stomach and intestines of the appellant. While in the hospital, the appellant defecated 85 foreign bodies in the shape of capsules which were confirmed by SP4, the chemist, to contain 367.4g of methamphetamine. The High Court judge made the finding of a prima facie case and in his defence the appellant said that while in Iran he was offered by his friend to take some medicine to Malaysia. He was told that the medicine, in the shape of capsules, had to be swallowed in order to avoid tax. He claimed that he had no knowledge of the drugs. The trial judge found that the defence by the appellant had failed to raise a reasonable doubt proceeded to find him guilty. Hence, this appeal. The appellant canvassed only one ground of appeal, namely that the trial judge had failed to judicially appreciate the case for the defence. The appellant contended that the trial judge had committed an error in failing to recognise that the appellant's defence was that he swallowed only 80 capsules and this part of the evidence was corroborated by the medical report, D87. The appellant's counsel invited the court to invoke s 114 (g) of the Evidence Act 1950 on the failure to call Dr Shahruzina to clarify the number of capsules. The appellant further submitted that there was no certainty in the judgment as to whether the trial judge relied on s 37(d) of DDA when in the

F

G

H

I

same breath she said that the prosecution can rely on s 37(da).

Held, dismissing the appeal; affirming the conviction and sentence:

(1) There was no merit in the appellant's submission because D87 was the document tendered by the defence to rebut the prosecution's case. The burden was on the defence to establish its truth. The law on burden of proof is clear. He who asserts must prove. Since it was the appellant who wanted to put a case that only 80 capsules as against the established evidence by the prosecution that 85 were obtained from him, then it is not for the prosecution to adduce that evidence and what more for s 114(g) to be invoked against the prosecution (see para 9).

(2) In her judgment, the trial judge said that the prosecution can rely on s 37(d) of the DDA to invoke a presumption of knowledge but at another time she said knowledge had been proven and s 37(da) can be relied upon by the prosecution to invoke a presumption of trafficking. The trial judge went on to find that the prosecution had proven trafficking under s 2 of the DDA relying on the definition of 'trafficking'. Elsewhere in her decision, the trial judge had required the appellant to 'rebut the presumption of knowledge and cast a reasonable doubt in the prosecution case'. There appeared to be some confusion in the way the trial judge dealt with her finding on knowledge and trafficking. However, a misdirection by the trial judge does not *ipso facto* warrant an acquittal (see paras 12–13).

(3) The prosecution had proven knowledge without relying on the presumption. On the evidence disclosed in the appeal records and the facts of the present case there was overwhelming evidence against the appellant. The fact that the drugs were found in the tummy of the appellant who had swallowed them, was not in dispute. The trial judge found the appellant's version of how he swallowed the drugs in question implausible. The totality of evidence reasonably supports the conclusion that the appellant was in actual possession at the time he was arrested and detained. Any reasonable tribunal armed with those same facts would conclude that the appellant was found to be in actual possession independent of s 37(d) of the DDA (see para 14).

[Bahasa Malaysia summary

Perayu merayu kepada mahkamah ini terhadap sabitan dan hukuman mati kerana mengedar dadah di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). Perayu ditahan oleh sepasukan pegawai narkotiks yang diketuai oleh SP3 di Dewan Ketibaan Antarabangsa, KLIA Sepang. Pemeriksaan terhadap perayu dan bagasinya tidak menunjukkan apa-apa yang menyalahi undang-undang. Perayu kemudiannya dibawa ke Hospital Serdang dan imej x-ray yang dilakukan ke atasnya menunjukkan bahawa terdapat benda asing di dalam

perut dan usus perayu. Sewaktu di hospital, perayu membuang melalui duburnya 85 benda asing melalui yang mana disahkan oleh SP4, ahli kima, mengandungi 367.4g methamphetamine. Hakim Mahkamah Tinggi membuat dapatan kes prima facie dan dalam pembelaannya perayu mengatakan bahawa semasa di Iran dia telah ditawarkan oleh kawannya untuk membawa beberapa ubat ke Malaysia. Dia diberitahu ubat-ubat itu, dalam bentuk kapsul, hendaklah ditelan untuk mengelakkan cukai. Dia mendakwa bahawa dia tidak mempunyai apa-apa pengetahuan tentang dadah itu. Hakim perbicaraan mendapati bahawa pembelaan perayu gagal untuk membangkitkan keraguan munasabah dan terus mendapatinya bersalah. Maka, rayuan ini. Perayu hanya mengemukakan satu alasan untuk rayuan, iaitu hakim perbicaraan gagal secara kehakiman untuk menilai kes pembelaan. Perayu menegaskan bahawa hakim perbicaraan telah melakukan kekhilafan kerana gagal untuk menerima bahawa pembelaan perayu bahawa dia hanya menelan 80 kapsul dan bahagian ini telah disokong oleh laporan perubatan, D87. Peguambela perayu memohon mahkamah menggunakan s 114(g) Akta Keterangan 1950 atas kegagalan untuk memangil Dr Shahruniza untuk menerangkan jumlah kapsul. Perayu selanjutnya berhujah bahawa tiada apa-apa kepastian dalam penghakiman sama ada hakim perbicaraan bergantung kepada s 37(d) ADB apabila pada masa yang sama pendakwaan boleh bergantung kepada s 37(da).

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman.

(1) Tiada merit dalam hujahan perayu kerana D87 adalah dokumen yang dikemukakan oleh pembelaan untuk mematahkan kes pendakwaan. Beban adalah atas pembelaan untuk membuktikan kebenarannya. Undang-undang terhadap beban pembuktian adalah jelas. Oleh kerana perayu yang hendak menyatakan kes bahawa hanya 80 kapsul bertentangan dengan keterangan yang dibuktikan oleh pendakwaan bahawa 85 yang diperolehi daripadanya, maka ia bukanlah untuk pendakwaan untuk mengemukakan keterangan dan apatah lagi untuk s 114(g) digunakan terhadap pendakwaan (lihat perenggan 9).

(2) Dalam penghakimannya, hakim perbicaraan mengatakan bahawa pendakwaan boleh bergantung kepada s 37(d) ADB untuk menggunakan anggapan pengetahuan tetapi pada masa yang lain dia mengatakan pengetahuan telah dibuktikan dan s 37(da) boleh digunakan oleh pendakwaan untuk membangkitkan anggapan pengedaran. Hakim perbicaraan terus mendapati bahawa pendakwaan telah membuktikan pengedaran di bawah s 2 ADB bergantung kepada definisi 'trafficking'. Di perenggan lain dalam keputusannya, hakim perbicaraan memerlukan perayu untuk 'rebut the presumption of knowledge and cast a reasonable doubt in the prosecution case'. Kelihatan beberapa kekeliruan dalam cara hakim perbicaraan membuat dapatannya terhadap pengetahuan pengedaran. Walau bagaimanapun,

salah arah oleh hakim perbicaraan tidak *ipso facto* membenarkan pembebasan (lihat perenggan 12–13).

(3) Pendakwaan telah membuktikan pengetahuan tanpa bergantung kepada anggapan. Pada keterangan yang didedahkan di rekod rayuan dan fakta kes ini terdapat keterangan yang mencukupi terhadap perayu. Fakta bahawa dadah ditemui di dalam perut perayu yang telah menelannya, tidak dipertikaikan. Hakim perbicaraan mendapati versi perayu bagaimana dia menelan dadah yang dipersoalkan tidak masuk akal. Keseluruhan keterangan secara munasabah menyokong kesimpulan bahawa perayu mempunyai milikan sebenar pada waktu dia ditangkap dan ditahan. Mana-mana tribunal yang mempunyai fakta yang sama akan menyimpulkan bahawa perayu didapati mempunyai milikan sebenar bebas terhadap s 37(d) ADB (lihat perenggan 14).]]

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Mamasobri bin Useng v PP [2011] MLJU 503, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
Sia Pang Liong v PP [2011] 6 CLJ 759, CA (refd)
Teuku Nawardin Syamsuar v PP [2011] 3 CLJ 353, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-257 of 2011 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Mohd Mukhzany Fariz bin Mohd Mokhtar (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] At the High Court in Shah Alam the appellant was charged and convicted under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA') and was sentenced to the mandatory death sentence under the Act. His appeal came before us on 21 August 2014 which, by a unanimous decision we have dismissed. We now give our reasons for our decision.

[2] In summary it was the case for the prosecution that on 9 March 2011 at about 4.15pm, the appellant was stopped by a team of narcotics officers led by SP3 at the International Arrival Hall, KLIA Sepang. An examination of the appellant and his baggage did not reveal anything wrong. The appellant was then taken by SP5 to the Serdang Hospital and an x-ray was performed on him. The image of the x-ray revealed that there were foreign bodies in the stomach and intestine of the appellant. The appellant was then admitted to Ward 6C of the said hospital from 9–14 March 2011.

[3] While in the hospital, the appellant defecated 85 foreign bodies in the shape of capsules which were sent to the chemist by the investing officer ('IO'). SP4 (Encik Zulkfeli bin Mohd Edin) the chemist confirmed the 85 capsules to contain 367.4g of methamphetamine.

[4] At the end of the prosecution's case the learned High Court judge came to a finding that a prima facie case was made out and called upon the appellant to enter his defence.

[5] The appellant elected to give evidence on oath. In his defence he said while in Iran he was offered by his friend named Babak to take some medicine to Malaysia. He was told that the medicine in the shape of capsules had to be swallowed in order to avoid tax. Subsequently on arrival at KLIA he was arrested. He claimed that he had no knowledge of the drugs.

[6] At the conclusion of the trial the learned judge, having found that the defence by the appellant failed to raise a reasonable doubt proceeded to find him guilty. Hence this appeal.

[7] Before us learned counsel for the appellant canvassed only one ground of appeal, namely that the learned trial judge had failed to judicially appreciate the case for the defence.

[8] The appellant contended that the learned trial judge had committed an error in failing to recognise that the appellant's defence was that he swallowed only 80 capsules and this part of the evidence was corroborated by the medical report, D87. As such, to prove its case that the appellant defecated 85 capsules and not 80, the prosecution ought to have called Dr Shahruzina to testify that the report was a mistake. Learned counsel for the appellant invited the court to invoke s 114(g) of the Evidence Act 1950 on the failure to call Dr Shahruzina to clarify the number of capsules.

[9] We do not find merit in this submission because D87, was the document tendered by the defence to rebut the prosecution's case. The burden is on the defence to establish its truth. The law on burden of proof is clear. He who

asserts must prove. Since it is the appellant who wanted to put a case that only 80 capsules as against the established evidence by the prosecution that 85 were obtained from him, then it is not for the prosecution to adduce that evidence and what more for s 114(g) to be invoked against the prosecution.

[10] Learned counsel for the appellant further submitted that there was no certainty in the judgment as to whether the learned trial judge relied on s 37(d) of the DDA when in the same breath at p 187 in her judgment she said that the prosecution can rely on s 37(da). Having said that, the learned trial judge found trafficking proved under s 2 of the Act, but yet again at p 191 required the appellant to 'rebut the presumption of knowledge and cast a reasonable doubt in the prosecution case'.

[11] This issue came about when the learned trial judge found that the defence story was inherently impossible, unreasonable and not logical. The defence according to the learned judge was a bare denial and had not cast a reasonable doubt on the case of the prosecution.

[12] Having found so, first, the learned judge at p 187 of her judgment said the prosecution can rely on s 37(d) of DDA to invoke a presumption of knowledge but at another time she said knowledge had been proven and the s 37(da) can be relied upon by the prosecution to invoke a presumption of trafficking. Having said all those, she proceeded to find trafficking proved under s 2 of the Act. The learned judge went to find that the prosecution had proven trafficking under s 2 of the DDA relying on the definition of 'trafficking' which includes concealing, transporting and carrying of dangerous drugs. She supported her findings on the fact that the appellant was travelling from Tehran to Orumieh, then from Erbil to Bahrain then to Kuala Lumpur relying on the Federal Court decision in *Teuku Nawardin Syamsuar v Public Prosecutor* [2011] 3 CLJ 353 and *Sia Pang Liong v Public Prosecutor* [2011] 6 CLJ 759.

[13] Having done that, at p 191 the learned judge required the appellant to 'rebut the presumption of knowledge and cast a reasonable doubt in the prosecution case'. We agree with learned counsel for the appellant that there appear to be some confusion in the way the learned trial judge dealt with her finding on knowledge and trafficking. However, a misdirection by the learned judge does not *ipso facto* warrant an acquittal (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 and *Mamasobri bin Useng v Public Prosecutor* [2011] MLJU 503).

[14] On the facts of this case we agree with the submission of the learned DPP that the prosecution had proven knowledge without relying on the

presumption. On the evidence disclosed in the appeal records and the facts of the present case there was overwhelming evidence against the appellant. The fact that the drugs were found in the tummy of the appellant who had swallowed them, was not in dispute. The learned judge found the appellant's version of how he swallowed the drugs in question implausible. The totality of evidence reasonably supports the conclusion that the appellant was in actual possession at the time he was arrested and detained. Any reasonable tribunal armed with those same facts would conclude that the appellant was found to be in actual possession independent of s 37(d) of the Act.

[15] Having scrutinised the appeal records with care we are satisfied that this case appropriately allowed us to apply the proviso to s 60 of the Courts of Judicature Act 1964. On the evidence in the appeal records we are satisfied that the evidence against the appellant is overwhelming. The conviction on the appellant is safe. For all the reasons stated, the appellant's appeal was dismissed and the conviction and sentence on the appellant was affirmed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed